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HUMAN RIGHTS COMMITTEE

Sixty-ninth session

SUMMARY RECORD OF THE SECOND PART (PUBLIC)* OF THE 1850th MEETING

Held at the Palais Wilson, Geneva,
on Monday, 17 July 2000, at 4.10 p.m.

Chairperson: Mr. AMOR

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* The summary record of the first part (closed) of the meeting appears as document CCPR/C/SR.1850.

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GE.00-43321 (E)

The public part of the meeting was called to order at 4.10 p.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 7) (continued)
(CCPR/C/66/R.8/Rev.1; CCPR/C/69/R.4)

Draft general comment on article 4 of the Covenant

1. Mr. SCHEININ drew the Committee's attention to two documents. The first was CCPR/C/66/R.8/ Rev.1 containing his second draft of the general comment on non-derogable rights, which took account of the Committee's discussion at its sixty-seventh session and of written comments submitted subsequently by Mr. Ando. The second draft reflected a fundamental change of approach on the part of the Committee: rather than refer to non-derogable rights in addition to those specifically listed as such in article 4, paragraph 2, of the Covenant, the Committee had expressed a preference for a formula stating that the non-inclusion of a certain right on the non-derogable list did not constitute sufficient justification for derogation from certain internationally-protected fundamental rights. Moreover, the second draft represented an attempt to build a bridge towards other sources of human rights law and international law in general, with a view to restricting the scope of derogation in respect of those rights that did not belong to the narrowly defined category of non-derogable rights specifically mentioned in article 4, paragraph 2.

2. The second document before the Committee, CCPR/C/69/R.4, contained amendments to the second draft based on the Committee's discussions held at the sixty-eighth session in New York. The first amendment comprised three new paragraphs (2.1, 2.2 and 2.3) which were intended to replace paragraph 2 of the second draft, in the light of the Committee's unanimous preference, expressed at its sixty-seventh session, for a text to replace in full the existing general comment on article 4, namely General Comment No. 5, with a new one which addressed all aspects of article 4. Moreover, the wording of the new paragraph 2.2 also took specific account of the need for greater emphasis on proportionality in the field of derogations, as proposed by Mr. Klein.

3. A further important aspect of the amendments was that they built on the Committee's past practice through the introduction of footnotes listing relevant concluding observations. To that end, the second proposed amendment comprised a new sentence to be added at the end of paragraph 4, whose sole purpose was to introduce an accompanying footnote listing concluding observations that addressed the issue of non-derogable rights.

4. The third and final amendment to the second draft comprised two new paragraphs (15.1 and 15.2) to be added at the end of the existing general comment. They concerned the issue of international notification of a state of emergency under article 4, paragraph 3, of the Covenant, and were required in order to make the new general comment comprehensive in relation to article 4. The last sentence of the new paragraph 15.2 constituted a proposal that the Committee should appoint a special rapporteur on article 4 as a means of compensating for the lack of an established Committee procedure to deal with the great number of State party notifications it received in relation to article 4.

5. In conclusion, he suggested that the Committee first address the second draft of the general comment on non-derogable rights, since members were familiar with most of its content. However, discussion of those paragraphs, such as paragraph 2, which were the subject of the amendments contained in the other document before the Committee should be postponed so as to allow more time for consideration of the new material.

6. The CHAIRPERSON thanked Mr. Scheinin for the considerable efforts he had devoted to producing the new material, and invited members to comment on his proposal in the manner he had suggested.

Paragraph 1

7. Mr. LALLAH asked, on a point of information, whether the summary records of the Committee's initial discussion of the draft general comment on article 4 would be available to assist it in its consideration of the new draft.

8. Ms. MORALES (Secretariat) replied that unfortunately the records of that discussion, which had taken place in New York, were not yet available.

9. Mr. SCHEININ said that the purpose of paragraph 1 was to introduce the role played by derogations within the context of the overall Covenant. The draft contained two sections in square brackets, of which the second, in bold, was intended to replace the first. It read "In this general comment, replacing its General Comment No. 5, adopted in the thirteenth session (1981), the Committee seeks to assist States parties in their duty to implement article 4."

10. Mr. HENKIN thanked Mr. Scheinin for his highly professional contribution. Most of his previous objections to the wording of paragraph 1 had been met by the new material just quoted. However, he still had one objection: it was inappropriate to refer to the "duty" of States parties to implement article 4. He felt it would be better to amend that sentence along the lines "in respect of their rights and duties under article 4".

11. Mr. SCHEININ welcomed the thrust of that proposal, but felt that a reference to "rights and power" would be more appropriate, in order to reflect the fact that the Covenant was concerned with the rights of individual persons and the powers of Governments.

12. Mr. KLEIN proposed "to assist States parties in their duty to respect the rights of the Covenant in situations covered by article 4". He felt it was important to place more emphasis on the rights under the Covenant than on a State's powers to avail itself of the possibilities offered by article 4.

13. Ms. CHANET said that in French it would be sufficient to say "à s'acquitter de leurs obligations au titre de l'article 4" since the word "obligations" covered both rights and powers.

14. Mr. ZAKHIA proposed "to help States parties implement the provisions of article 4".

15 The CHAIRPERSON suggested that the Committee should adopt the second draft version of paragraph 1 on the following basis: retention of the first three existing sentences, deletion of the material in the first set of square brackets, and retention of the material in bold in the second set of square brackets, as read out by Mr. Scheinin, with the last clause amended to read: "... the Committee seeks to assist States parties to carry out their duties under article 4 of the Covenant".

16 Paragraph 1, as amended, was adopted.

Paragraph 3

17 Mr. SCHEININ said that paragraph 3 established a relationship between article 4, paragraph 1, requiring derogation measures to be limited in strict accordance with the exigencies of the situation, and the fact that certain articles of the Covenant were specifically listed in article 4, paragraph 2, as not being subject to derogation. The last sentence expressed the notion that, even in relation to those rights from which it was fully legitimate to derogate in times of emergency, States parties were under a general obligation to limit derogations to the exigencies of the situation. Articles 19 and 25 were cited as examples.

18 Mr. KRETZMER considered that the beginning of the first sentence, which read "The issue of which rights can be derogated from, and to which extent, ...", was inappropriate, since those issues were dealt with in paragraph 2. Paragraph 3 concerned the situations in which certain rights could be derogated from. The beginning of the sentence should be amended accordingly, or replaced by "The issue of which rights can be derogated from in any specific situation ...".

19 Secondly, in the third sentence the phrase "does not mean that other Covenant rights could be subjected to derogations at will" should be replaced by "does not mean that other articles in the Covenant may be subject to derogation at will".

20 Lastly, at the end of the final sentence he proposed replacing "legitimately" by "in principle". The clause would thus read: "albeit these provisions as such may in principle be subject to derogation".

21 Ms. CHANET said that, for the sake of consistency, the Committee needed to decide whether it preferred "state of emergency" or "state of exception". Furthermore, she was not convinced that articles 19 and 25 were the best examples to cite in relation to derogation. Either they should be omitted, or more appropriate examples, such as articles 9 or 17, might be mentioned instead of article 25. Lastly, she felt that the general comment should also include an appropriate reference to article 5 of the Covenant, in order to avoid the possibility of any confusion between the derogations envisaged by it and by article 4.

22 Mr. KLEIN said it was important to take account of the fact that States sometimes used the proclamation of a state of emergency as a means of justifying situations of almost any kind. He therefore proposed that the second sentence of paragraph 3 should be amended, or that reference be made in the general comment to the need for the measures taken by a State during

the state of emergency to relate specifically to the nature of the emergency. Derogation alone was insufficient: it was also important to clarify the purpose of the state of emergency, implying the terms for a return to normality. That idea had been present in the deleted paragraph 2.

23. The CHAIRPERSON, speaking as a member of the Committee, said the point raised by Ms. Chanet concerning terminology was very important. Under constitutional law a state of exception was a state which departed from the normal constitutional situation, and a state of siege and a state of emergency were merely examples of a state of exception. He had doubts regarding the reference to the holding of periodic elections in the last sentence, in view of the fact that a state of emergency would not by its very nature be likely to last long, and elections held under such conditions would in any event be suspect. If that sentence was to be retained, it should be made more general by means of a formulation along the following lines: "derogations from other provisions of the Covenant will be subject to scrutiny by the Committee in all circumstances". He agreed that the word "legitimately" in the last sentence was inappropriate.

24. Mr. HENKIN said it was important to make clear that the authority to derogate was subject to the conditions set out in article 4, paragraph 3, of the Covenant, and that any derogations by States parties would be subject to regulation and scrutiny by the international community.

25. Mr. SCHEININ thanked members of the Committee for their suggestions. The first sentence would be reworded to read "The issue of which rights can be derogated from in any specific circumstances"; and the words "in principle" would be substituted for "legitimately" in the last sentence. He would have no difficulty with the addition of a third sentence reading along the following lines "Concrete measures taken must have a connection with the nature of the state of emergency in question".

26. Concerning the points raised by Ms. Chanet and the Chairperson, he appreciated that it might be advisable to use other examples, but he believed that the issue of article 5 would be better dealt with in paragraph 6. In the last sentence, his intention had been to give examples of articles not related to fundamental rights which could not be derogated from because they overlapped with non-derogable provisions or were linked to other obligations of States parties applicable in times of emergency. However, it would be better to make the sentence broader in scope by referring to articles 17, 19, and 21, and omitting any reference to article 25. There might be need to return to article 25 at a later stage so as to cover situations where States parties had clauses in their constitutions prohibiting the holding of elections during states of emergency. Such situations often resulted in a decision not to declare a state of emergency in order to permit elections to be held, even when a de facto emergency actually existed, as appeared currently to be the case in the Russian Federation.

27. As to terminology, he wondered whether the problem might simply be one of translation. The term "state of emergency" had been used in the English text in order to ensure conformity with article 4 of the Covenant.

28. The CHAIRPERSON wondered whether there was need to make specific reference to articles 17, 19 and 21. It might be better simply to say "derogations in regard to any rights provided for in the Covenant".

29. Ms. CHANET said she would support that suggestion, in view of the fact that the previous sentence contained the words "careful analysis under each article of the Covenant". To single out some articles might imply that less attention needed to be paid to others.

30. Mr. ZAKHIA agreed.

31. Mr. KRETZMER said that, as he saw it, it would be helpful to the reader, who might not necessarily be a legal expert, to quote examples. The words "For instance" made clear that the list was not intended to be exhaustive.

32. Mr. KLEIN recalled that a similar situation had arisen when the Committee had been discussing its general comment on article 12. The examples given had initially been taken out, but had later been put back because they were seen as useful illustrations of the point being made. He believed the examples quoted should be retained.

33. Lord COLVILLE agreed that article 25 would be better dealt with elsewhere. However, the other articles quoted were intended as examples of derogations which were not self-evidently connected with a state of emergency, and which thus might lead States parties to assume that there was no need to have regard to the provisions of the Covenant when making them. He too supported their inclusion.

34. Mr. SOLARI YRIGOYEN said he was inclined to agree that the examples quoted had the effect of weakening the text. However, if it was decided to include examples, reference might also be made to article 10, paragraph 1.

35. Mr. HENKIN said that in the last sentence he would prefer the words "will be subject to international scrutiny, including scrutiny by the Committee". He believed that there was a need to reassert that derogations were subject to international legal obligations, and not merely to scrutiny by the Committee.

36. The CHAIRPERSON noted that there was now consensus on the text of paragraph 3, with the exception of the last sentence, which would be left in square brackets for later consideration.

Paragraph 4

37. Mr. SCHEININ, introducing paragraph 4, noted that since the paragraph dealt with two separate issues, the category of non-derogable rights and the conceptual distinction between restrictions and derogations, it might be better divided into two parts.

38. Although article 4, paragraph 2, already spelled out the articles from which derogations could not be made, it should not be forgotten that the Second Optional Protocol also pronounced on non-derogable rights. There was also a danger that certain such rights might be interpreted too narrowly: it was for that reason that the text summarized the content of each of the articles, making clear for example that article 7 covered medical or scientific experimentation without consent, as well as torture.

39 Mr. KRETZMER agreed that it would be better to separate the two issues dealt with. The fourth, fifth and sixth sentences should form a separate paragraph. He supported the inclusion of references to the content of the articles listed.

40 Ms. CHANET noted that care should be taken to ensure that those references were in line with the text of the Covenant: thus, in regard to article 11, the text should read "(prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation)".

41 Ms. EVATT, referring to the last sentence, said she did not disagree with the point being made, namely that the issue of whether restrictions on freedom might be justifiable under article 18, paragraph 3, was a separate issue from the derogability of rights. She would prefer the sentence to begin "Regardless of whether there is a state of emergency". However, she wondered whether freedom of religion was the best example to illustrate that point.

42 Ms. CHANET said that, in her view, the reference to article 18, paragraph 3, was entirely appropriate.

43 Mr. KLEIN pointed out that article 15, paragraph 2, likewise referred to a limitation in respect of a situation where a State might be under an obligation to take action. The idea expressed in the second half of paragraph 4 was therefore sound. Nevertheless any limitation of a non-derogable right must naturally be consonant with the provisions of the Covenant. Since different regimes were involved, they should be mentioned in that paragraph.

44 Mr. SCHEININ repeated that paragraph 4 should be split into two paragraphs: one listing non-derogable rights, the other setting out the conceptual distinction between restrictions and derogations. He would prefer a more substantive enumeration of the rights in question to a mere list of provisions. While he agreed with Mr. Klein that the paragraph on a conceptual distinction should include a short reference to article 15, paragraph 2, he thought that Ms. Evatt's proposal would cause confusion. He would rather deal with restrictions in another new paragraph, namely paragraph 2.2, on the proportionality principle. The drawback was that the restriction clauses in article 19 lost some of their normative quality in the event of an emergency, when a State party invoked article 4 to derogate from that article. In that case there was no such legal obligation in relation to the limitation clause, since there was a shift from the regime of the restrictions clause to the regime of article 4 itself. Hence the limitation was entirely different from that provided for in article 18. He would therefore be inclined not to quote it as an example in that paragraph.

45 Mr. KRETZMER said he remained unconvinced that it would be appropriate to mention article 15, paragraph 2, in that context, because it concerned a separate issue. Since article 18 spoke of a power that a State possessed to limit a right, it must be dealt with in that paragraph. In his opinion, article 15, paragraph 2, was more of an interpretative device which made it plain that, although article 15 provided for a restriction, it did not apply when the act was punishable under the general principles of law. It did not therefore belong in paragraph 4.

46 Mr. LALLAH asked about the precise import of the sentence starting "Conceptually ...". He supposed that its purpose was to draw a distinction between derogations and the restrictions provided for in the various articles of the Covenant. It was a useful distinction, but surely the

word "legitimate" really referred to derogations under article 4. If that were so, would any limitations or restrictions ever be legitimate under those provisions? Was "legitimate" to be understood in the sense of limitations other than those to which the provisions would already be subject under the Covenant? Derogations were different from restrictions and might go beyond them. Since they were permissible under some articles of the Covenant, the term "legitimate" seemed to introduce an element of vagueness.

47. Lord COLVILLE concurred with Mr. Lallah that if Mr. Scheinin was going to start a new paragraph with the sentence commencing "Conceptually ...", he might take the opportunity of rephrasing it to read, for example, "A derogation is of course a different concept to that of restrictions and limitations." If it was plainly stated that a distinction existed, the rest followed.

48. Mr. KLEIN felt that the word "legitimate" was inappropriate. Perhaps the new paragraph could begin "Conceptually, the qualification ... does not mean that these rights could never be limited or restricted".

49. Mr. HENKIN said that Mr. Lallah and Lord Colville had convinced him of the need for redrafting. A distinction must be made between restrictions which were applicable in normal times and the whole idea of derogation. Even if a provision was qualified as non-derogable, that did not mean that no limitations or restrictions would ever be legitimate, that much was obvious from the various clauses of the Covenant. An introductory phrase which distinguished between restrictions in normal times and derogation was the solution. Article 18 could then be quoted as an example of that difference.

50. Mr. KLEIN said the point was not that there was a difference between limitations in normal times and derogation, but that, in times of emergency, those rights could not be derogated from. Nevertheless, the normal limitations could be applied.

51. Mr. KRETZMER agreed with Mr. Klein and Mr. Lallah. The word "Conceptually" could be deleted and the sentence should read "Categorization of a Covenant provision as a non-derogable one does not necessarily mean that no limitations or restrictions would ever be permissible under the Covenant."

52. Mr. SCHEININ considered that Mr. Kretzmer had submitted a very logical proposal which did not diverge greatly from Mr. Klein's suggestion. In his opinion, the text should not state that in times of emergency the only permissible restrictions were those which would be permissible without the state of emergency. The state of emergency might affect the interpretation of the restrictions clause, but naturally the restriction must be based on the actual situation and the application of the provisions of the Covenant.

53. The CHAIRPERSON said that paragraph 4 would be divided into two paragraphs. The first paragraph would deal with non-derogable rights and the second with restrictions. The last sentence referring to article 18 had not been questioned and would be retained.

54. With those amendments, paragraph 4 was adopted.

Paragraph 5

55. Mr. SCHEININ explained that paragraph 5 related to the prohibition of discrimination in times of emergency. Article 4, paragraph 1, contained a special clause which made it clear that the obligation not to discriminate existed even in such circumstances and in relation to measures derogating from the provisions of the Covenant. In order to buttress that requirement, the draft discussed non-discrimination as an overarching theme in the Covenant and then concluded that article 4, paragraph 1, established a core obligation of non-discrimination by prohibiting measures involving discrimination solely on certain grounds. The term "solely" was the heart of the problem but, as it stood, the text proved that the Committee proceeded from the assumption that non-discrimination was central to the purport of the Covenant as a whole.

56. Ms. EVATT said that it was necessary to comment briefly on the word "solely" in the first sentence. Even discrimination on grounds other than those set forth in paragraph 5 must still conform to the strict requirements listed in that paragraph relating to the exigencies of the situation and other international-law obligations. A general statement should be made about the effect of the word "solely" and the limited list of grounds.

57. Mr. ZAKHIA said that he also wished to focus on the word "solely". The French equivalent "uniquement" introduced some ambiguity into the text. A better formulation should be found.

58. Mr. KRETZMER endorsed the comments of Ms. Evatt and Mr. Zakhia. If the text was to be meaningful, the term "solely" would require careful consideration. The difficulty lay in the fact that it would be necessary to show that any discrimination was based on the exigencies of the situation. If it was possible to prove that then discrimination would not rest solely on one of those grounds. It was necessary to spell that out.

59. What did the rest of the paragraph mean? What dimensions of rights were non-derogable? What did the last sentence mean? If the Committee did not understand the text, how could a State party be expected to comprehend it? The sense must be made clear.

60. Mr. SOLARI YRIGOYEN considered that the Spanish version of paragraph 5 was abstruse. The comments on paragraph 1 of article 4 must be harmonized with those on paragraph 2. Paragraph 1 referred to discrimination solely on certain grounds, whereas paragraph 2 did not specify any circumstances in which derogations could be made from the articles listed therein, although that would appear to be possible in accordance with the spirit of the last sentence of paragraph 1. It was vital to clarify the wording in all languages in order to explain that, as stated in paragraph 1, discrimination was prohibited, notwithstanding the contents of paragraph 2.

61. Mr. LALLAH said that the first sentence tended to introduce some unnecessary vagueness. Was anything gained from the use of the words "the legitimacy of"? Would it not be possible to say "one of the conditions for any derogation is that the measures taken do not involve discrimination"? The issue was permissibility rather than legitimacy.

62. Mr. ANDO agreed with Mr. Lallah that "the legitimacy of" should be deleted, because the Committee was discussing the permissibility of derogations. As Ms. Evatt had pointed out, the paragraph required elaboration in order to explain why "solely" was employed in conjunction with six grounds.

63. Article 4, paragraph 1, emphasized certain conditions, one of which (the exigencies of the situation) had been considered in paragraph 4. The second condition, namely that no measure should involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin, was perfectly clear and those grounds were regarded as more basic than others listed in article 2, paragraph 1, and article 26. That point should be stressed in paragraph 5. When discriminatory measures were adopted during emergencies, those particular grounds could not be used as a basis for them.

64. Mr. KLEIN said that the draft text jumped between paragraphs 1 and 2 of article 4. Would it not be better to deal with all the issues raised by article 4, paragraph 1, and then go on to consider article 4, paragraph 2?

65. He agreed with Mr. Lallah that the word "legitimacy" should be avoided in paragraph 5. Why was it necessary to note that article 26 and other Covenant provisions relating to non-discrimination had not been listed in article 4, paragraph 2, since that was self-evident? It was clear that dimensions of non-discrimination were addressed in that article, because the last sentence of paragraph 1 enumerated specific grounds.

66. Paragraph 5 should not contain any reference to article 26 or the other Covenant provisions on non-discrimination. It should merely state that those aspects of non-discrimination were covered by article 4, paragraph 1, and should therefore be taken into account. The impression that an attempt was being made to re-introduce them through the back door should be avoided at all cost.

67. The CHAIRPERSON said that the overall structure of the draft would be reviewed in due course. Three difficulties arose in connection with paragraph 5: the first related to the word "solely"; the second concerned the term "legitimacy"; and the third involved the clarity of the paragraph. It would be advisable to word the paragraph more simply. Nevertheless, no objections had been expressed about its substance.

68. Mr. SCHEININ explained that the order of the paragraphs had been based on the original idea of offering a general comment on non-derogable rights. It had therefore been useful first to list those rights and then to go back and forth between paragraphs 1 and 2 in order to elaborate. The word "legitimacy" could easily be deleted. Greater clarity could be achieved by following Mr. Kretzmer's proposal that the notion of core obligation be removed and by following Mr. Klein's proposal that the reference to other provisions of the Covenant on non-discrimination be shortened. Non-discrimination as a leitmotif of the Covenant should be underscored.

69. The last sentence could be replaced by a statement to the effect that, even in cases where States parties did make distinctions in times of emergency which did not amount to discrimination on those specific grounds, they must be consistent with the exigencies of the

situation and with their other international-law obligations. The text would be more intelligible if the term "solely" was explained at least in part and if it was stated that, under article 4, direct discrimination was prohibited, but indirect discrimination might not be covered, for example in instances where legislation had discriminatory effects. He would prefer a combination of the proposals of Ms. Evatt and Mr. Klein in order to delete the notion of core obligation.

70. The CHAIRPERSON said that while he understood Mr. Scheinin's concern about the term "solely", in view of members' observations he would prefer the idea to be expressed differently.

71. Subject to the amendments to be made by Mr. Scheinin, paragraph 5 was adopted by consensus.

The meeting rose at 6.05 p.m.